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In the Supreme Court of the United States

OCTOBER TERM, 1982

MARINE TERMINALS CORPORATION AND INA/PACIFIC EMPLOYERS INSURANCE GROUP, PETITIONERS

v.

JOHN F. KELLY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a waterfront terminal guard, whose principal duty is to maintain the security of shipping containers during the loading and unloading program, is "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 678 F. 2d 830. The decision and order of the Benefits Review Board (Pet. App. 2-10) is reported at 13 Ben. Rev. Bd. Serv. (MB) 609. The decision and order of the administrative law judge (Pet. App. 11-22) is reported at 11 Ben. Rev. Bd. Serv. (MB) 11.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1982. The petition for a writ of certiorari was filed on August 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to the time of his injury, respondent John F. Kelly had been a security guard at the Oakland, California, waterfront for about one and a half years, providing cargo

security for various employers (Pet. App. 3, 12). During this time, he was subject to assignment in any part of the shipping terminal, including on board ship (*id.* at 6). At the time of his injury, Kelly was working for petitioner Marine Terminals Corporation (*id.* at 3). Kelly's primary duties were to patrol the portion of the terminal where shipping containers used in maritime commerce were stored, to prevent theft and fire, report on downed fences or unauthorized persons, and ensure that temperatures on refrigerated containers remained constant (*id.* at 1, 13). On the night of his injury, Kelly was assigned to drive around the container storage area and to punch in at 11 key stations (*id.* at 12-13). While attempting to locate a key station, he struck his foot against a concrete box housing electrical outlets for refrigerated containers, causing him to fall and sustain various injuries (*id.* at 12).

2. Respondent Kelly filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. IV) 901 *et seq.* (LHWCA). Petitioner Marine Terminals Corporation and its insurance carrier, petitioner INA/Pacific Employers Insurance Group, disputed the claim, asserting, *inter alia*, that the claimant was not "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3). After a hearing, an administrative law judge (ALJ) determined that Kelly was engaged in maritime employment and awarded him compensation under the Act (Pet. App. 12).[1]

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[1]In addition to the "maritime employment" requirement of Section 2(3) of the Act, a covered injury must occur upon navigable waters or "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." Section 3(a), 33 U.S.C. 903(a). The satisfaction of this "situs" test is not at issue in this case.

Petitioners appealed to the Benefits Review Board pursuant to 33 U.S.C. 921(b). In a divided decision, the Board ruled that Kelly was not covered by the Act. Although acknowledging that the Second Circuit, in *Arbeeny* v. *McRoberts Protective Agency*, 642 F. 2d 672, cert. denied, 454 U.S. 836 (1981), found similar claimants covered because guard duties involve an integral part of the loading and unloading process, the Board nevertheless concluded that "security guards do not perform duties which involve longshore operations" (Pet. App. 4-5 & n.3). The Board stated that "[g]uard duties alone lack the realistically significant relationship to navigation and commerce which would bring a claimant within the more general category of maritime employment" (*id.* at 4) (citation omitted). The Board's dissenting member concluded that Kelly's duties as a waterfront security guard "involved an integral part of a longshoring operation" (*id.* at 7).

3. Respondent Kelly sought judicial review of the Board's decision under 33 U.S.C. 921(c). The court of appeals reversed, holding that Kelly was engaged in maritime employment within the meaning of the Act (Pet. App. 1). The court found the facts in this case "indistinguishable" from those in *Arbeeny* v. *McRoberts Protective Agency, supra*. The court noted that the claimants in *Arbeeny*, like Kelly, "were covered because in protecting cargo from theft they were an integral part of the loading process" (Pet. App. 1). Accordingly, the Board's order was reversed "for the reasons stated in *Arbeeny*" (*ibid.*).

ARGUMENT

The court of appeals correctly applied this Court's decisions regarding coverage under the Longshoremen's and Harbor Workers' Compensation Act to the particular facts of this case. The court's ruling that a waterfront terminal guard is engaged in "maritime employment" does not conflict with the views of any other circuit and does not warrant further review.

1. This Court declined to review the Second Circuit's decision in *Arbeeny* v. *McRoberts Protective Agency, supra*, upon which the court of appeals relied in holding that respondent Kelly was engaged in maritime employment. 454 U.S. 836 (1981). The facts in *Arbeeny*, found to be "indistinguishable" from those in the instant case (Pet. App. 1), involved pier guards whose primary responsibility was surveillance of cargo on piers, docks and other marine terminal areas to protect against theft, fire and vandalism. 642 F. 2d at 674. Reversing the Benefits Review Board, the Second Circuit concluded that the activities of the claimants "were an integral part of the loading and unloading of cargo." *Id.* at 675.

Since *Arbeeny*, another circuit has similarly held that a vessel watchman, injured on actual navigable waters while aboard the vessel, was engaged in maritime employment under the Act. *Holcomb* v. *Robert W. Kirk & Associates, Inc.*, 655 F. 2d 589 (5th Cir. 1981), petition for cert. pending, No. 81-1109 (filed Dec. 4, 1981).[2] No other court of appeals has ruled otherwise. Therefore, review should be denied here for the same reasons as in *Arbeeny*.

2. In *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 (1979), this Court held that the "maritime employment" coverage test of Section 2(3) of the Act is satisfied by workers (including cargo handlers) "engaged in intermediate steps of moving cargo between ship and land transportation." In

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[2] *Holcomb* raises the question of coverage under the 1972 LHWCA amendments for workers who would have been covered by the pre-1972 Act because they were injured on actual navigable waters. This is the issue presented to this Court in *Director, OWCP* v. *Perini North River Associates*, cert. granted, No. 81-897 (Feb. 22, 1982). For that reason, the Director urged that the Court hold the *Holcomb* petition in abeyance pending a decision in the *Perini* case. See Brief for the Federal Respondent, at 4 (No. 81-1109, 1981 Term). Because no such issue is presented here, there is no reason to hold this case pending the decision in *Perini*.

Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249, 271 (1977), the Court ruled that cargo "checkers," who do not actually move cargo but identify and record it in its transfer between land and sea transportation, are "engaged in maritime employment" because their work is an "integral part" of the loading and unloading process. The court of appeals correctly applied these principles in this case.

Relying on *Arbeeny*, the court of appeals concluded that dockside security guards are "an integral part of the loading and unloading process" (Pet. App. 1). In protecting against the loss of cargo, the claimant, like the checker in *Caputo*, "unquestionably serves a maritime purpose—the safe transit of goods shipped by sea." *Arbeeny* v. *McRoberts Protective Agency, supra*, 642 F. 2d at 675. Thus, the court of appeals did not eliminate the status requirement of *Pfeiffer*, as petitioners assert (Pet. 4), but rather logically concluded that a terminal guard is engaged in "maritime employment" within the meaning of Section 2(3) of the Act.[3]

3. The court of appeals' decision is supported by early cases holding that port guards injured on actual navigable waters were within the coverage of the original (pre-1972) Longshoremen's Act, which covered only employees injured on the water. Before this Court's rulings in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), and *Davis* v.

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[3]The court of appeals' conclusion that a terminal guard's work is integrally related to the longshoring process is consistent with the decisions of other courts that hold, for example, that workers who maintain and repair the machinery, equipment, and facilities used in longshoring operations are covered by the Act. See, *e.g.*, *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F. 2d 750, 755-758 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); *Garvey Grain Co.* v. *Director, OWCP*, 639 F. 2d 366, 370-371 (7th Cir. 1981); *Prolerized New England Co.* v. *Benefits Review Board*, 637 F. 2d 30, 37-38 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981); *Price* v. *Norfolk & W. Ry.*, 618 F. 2d 1059, 1061-1062 (4th Cir. 1980); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F. 2d 137, 140 (9th Cir. 1978).

Department of Labor, 317 U.S. 249 (1942), some courts of appeals took the view that the "maritime-but-local" doctrine limited coverage of the LHWCA to employment injuries that were beyond the constitutionally permissible reach of state workers' compensation laws. That is, they tested the Act's coverage by whether the employment was directly related to interstate or international maritime commerce, rejecting coverage of injuries in the course of employment that, though performed on federal maritime waters, were of local concern and of no direct relation to navigation and commerce. See *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 717-719 (1980); *Simpson* v. *Director, OWCP*, 681 F. 2d 81, 82-83 (1st Cir. 1982). Yet, even under that restrictive interpretation of the Act's coverage, the duties of port guards, to the extent they were performed aboard ship, were repeatedly held to be within the reach of the Act. *Hillcone S.S. Co.* v. *Steffen*, 136 F. 2d 965 (9th Cir. 1943); *Lowe* v. *Central R.R.*, 113 F. 2d 413 (3d Cir. 1940); *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. 2d 779 (2d Cir. 1933); *Union Oil Co.* v. *Pillsbury*, 63 F. 2d 925 (9th Cir. 1933). These early cases under the old "maritime-but-local" test further demonstrate the inherently maritime character of port guards' work.[4]

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[4]As the use of containerization has moved much of the operation of loading and unloading shoreward, the traditional maritime function of maintaining the security of the cargo has also moved to waterfront terminals. As the Court has noted, "[o]ne of the primary motivations for Congress' decision to extend the coverage shoreward was the recognition that 'the advent of modern cargo-handling techniques' had moved much of the longshoreman's work off the vessel and onto land." *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 269-270 (1977) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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